Counsel for plaintiff also submitted that the Kadi did not know English and, therefore, he could not understand the provisions of the Enactment which was written in English. He alleged that the Kadi was administering the law in ignorance, and had to rely on the law as translated to him, or to rely on the unlawful translation (into Malay) of the English text. At para 15 of the Statement of Claim, it is alleged that the Kadi was therefore not competent to hear the plaintiff's case.

I note that under section 22 of the Enactment, suitable persons may be appointed by the Sultan as Kadis, and that under section 25(2) of the Enactment, a Kadi is competent to try a criminal case punishable with imprisonment not exceeding one month. An offence under section 149 of the Enactment carries a maximum penalty of one month's imprisonment. I think the competency or otherwise of the Kadi to hear the criminal case against the plaintiff, and all the other points raised in the submission by the plaintiff's counsel are points which properly should be submitted for consideration by the Syariah Appeal Court at the hearing of the plaintiff's appeal there. I am also of the view that since the criminal proceedings against the plaintiff in the Kadi's Court has not been finally determined by the Syariah Appeal Court in the plaintiff's favour, it is premature for the plaintiff to bring this action.

I am, therefore, satisfied that the plaintiff's Statement of Claim discloses no reasonable cause of action against the three defendants, and I order that it be struck out with costs.

Claim Struck Out.

Solicitors: *Wan Abdul Muttalib & Co.*

BRUNEI REPORTS

HAJI MATUSSIN BIN PENGARAH RAHMAN v. HAJJAH TAMPOI BTE. HAJI MATUSSIN & ORS.

[C.A. (Briggs P., Leonard & Kempster CC.) May 21, 1983]
[Bandar Seri Begawan – Civil Appeal No. 4 of 1982]

Land Law – Adverse possession alleged since 1964 – Whether said claim could survive repeal of Limitation of Suits Enactment 1918 – Whether subsequent Limitation Enactment 1962 of retrospective effect – Limitation Enactment 1962, ss. 3, 13 & 26; arts. 110 & 112 – Limitation of Suits Enactment, 1918, s. 3(g) – Land Code (Cap. 40), ss. 9(1), 27, 28(3) & 29.

Limitation – Effect of repeal of Limitation of Suits Enactment on claim of adverse possession since 1964 – Whether subsequent Limitation Enactment 1962 of retrospective effect.

The question posed before the court in this case was, "Did the right of the defendant to seek the exercise of the court's discretion in his favour so as to dismiss a claim by the plaintiffs for possession, having regard to this alleged and admitted adverse possession since 1964, survive the repeal of the Limitation of Suits Enactment?"

Held: (1) section 13 of the Limitation Enactment 1962 suggests overwhelmingly that the Limitation Enactment 1962 had retrospective effect;

(2) the defendant had an accrued and surviving right to seek the court's discretion under the Limitation of Suits Enactment 1918; a right expressly preserved by Section 10(c) and (e) of the Interpretation and General Clauses Enactment 1959. Such a right is not to be taken away by refusing a retrospective operation to the repealing statute unless such a construction is unavoidable;

(3) in the premises the plaintiffs' titles were extinguished pursuant to section 26 of the Limitation Enactment 1962 and the defendant/appellant succeeds as against the plaintiffs both on the claim and counterclaim.

Case referred to:

(1) *Yew Bon Tew* v. *Kenderaan Bas Mara* [1982] 3 All E.R. 833, 839; [1983] 1 M.L.J., P.C.

COURT OF APPEAL.

F.S. Choo for the appellant.
Ian Bond for the respondent.

Cur. Adv. Vult.

Kempster C.: In these proceedings both plaintiffs and defendant appealed from a judgment of Mr. Commissioner Jones given on August 4, 1982 whereby he made an order for possession of land known as Lot 218 in the district of Brunei in the plaintiffs' favour. In the course of the hearing of the action and of this appeal a number of questions relating to the Land Law of the State have, we are told, been argued for the first time.

The Writ was issued on June 19, 1979 by the registered owners of nearly half of the undivided shares in the land in question naming as defendant the 87 year old son of the long deceased gentleman registered as the owner of the moiety of shares. Registration had, in all instances, been effected pursuant to the provisions of the Land Code which had come into force on September 6, 1909.

The prayer of the Statement of Claim sought an account of rents and profits received by the defendant by reason of his occupation and enjoyment of the land, payment, demolition of buildings erected on the land by the defendant without the knowledge or consent of the plaintiffs, damages and further or other relief.

On July 25, 1979 the plaintiffs signed interlocutory judgment for damages to be assessed and for a final mandatory order for demolition of buildings; all these in default of Defence. But the plaintiffs appear to have taken no steps thereunder because on September 20, 1980 they obtained a separate and inconsistent order, for an account of monies belonging to them which had come into the hands of the defendant, pursuant to Order 15 of the Brunei High Court (Civil Procedure) Rules, which reads:-

"Where a writ of summons has been indorsed for on account, or where the indorsement on a writ of summons involves taking an account, if the defendant either fails to appear, or does not after appearance by affidavit or otherwise satisfy the court or a Judge that there is some preliminary question to be tried, an order for proper accounts, with all necessary inquiries and directions now usual in similar cases, shall be forthwith made."

The plaintiffs did not seek to implement this still extant order either but in the fullness of time the defendant made an application to set the default judgment given in July 1979 aside. Mr. Commissioner O'Connor made an order to this effect on May 23, 1981; an order which was upheld by the Court of Appeal on November 18, of the same year.

On June 11, 1981 a Defence was filed and on the 27th of that month a Reply. On February 4, 1982, pursuant to an order of the Chief Registrar, an Amended Defence was filed. Upon these pleadings issue was joined and the trial before Mr. Commissioner Jones commenced on July 19 of last year.

The defendant claimed title deriving from the provisions of Sections 3 and 26 and Articles 110 and 112 of the Limitation Enactment 1962 which, despite its title, had not come into effect until September 1, 1967; pursuant to Notification No. S203 of that year.

Section 3 of the Limitation Enactment reads:-

"Subject to sections 4 to 24 inclusive, (of no significance in the case under consideration) every suit instituted after the period of limitation prescribed therefor by the Schedule, if limitation has been set up as a defence (as was the case here) shall be dismissed."

And section 26:-

"At the determination of the period limited by this Enactment to any person for instituting a suit of recover possession of immovable property, the right and title of such person to the immovable property, for the recovery whereof such suit might have been instituted within such period, shall be extinguished."

Turning to Articles 110 and 112:-

"No.	Description of Suit	Period of Limitation	Time from which period begins to run
110.	For possession of immovable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years	The date of the dispossession or discontinuance.
112.	For possession of immovable property or any interest therein not hereby otherwise specially provided for.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff. "

The plaintiffs contended and contend that the provisions which I have just read are void as being repugnant to Sections 9(1), 27 and 28(3) of the Land Code Cap. 40 which read:-

Section 9(1):-

"Every title be entry in the Registrar shall vest in the person named therein a surface right only to the land specified therein and such person shall have a permanent transmissible and transferable estate, interest and occupancy of his land subject to the provisions of this section or such lesser estate as shall be specified in the entry."

Section 27:-

"No claim to or interest in any land shall be valid unless it has been registered in the Land Office."

Section 28(3):-

"Every entry in the Register shall be taken as conclusive evidence that the person named therein as owner of the land is the absolute and indefeasible owner thereof for the estate specified therein subject to the conditions upon which the original entry was made and the title of such proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party."

No allegation of fraud or misrepresentation is made in the present proceedings.

Though *prima facie* the provisions of the Limitation Enactment 1962 and of the Land Code are indeed mutually repugnant the law strives to reconcile apparently conflicting provisions and, if this be impossible, will hold that the earlier provisions stand repealed by the latter. The facts here falling for consideration are not such as to invoke either the principle *'generalia specialibus non derogant'* or any legal fiction to the effect that the registered proprietor enjoys a perpetual and constructive possession. On the contrary, to quote Livy, *'Ubi duae contrariae leges sunt semper antiquam abrogat nova."*

The whole of the Limitation Enactment is surely part of the Law of Brunei though application pursuant to Section 29 of the Land Code is required in order to perfect a title acquired pursuant to Section 26 of the Limitation Enactment as appears to be recognised by the prayer of the Counterclaim. I shall approach the submissions made on behalf of the parties accordingly.

Article 110 of the Limitation Enactment postulates the cessation of possession by the plaintiffs. In this regard it is, in my view, sufficient to say that there was evidence which entitled the learned Commissioner to find that the plaintiffs did not occupy the land in question within any material period of 12 years.

Article 112 of the Limitation Enactment postulates possession by the defendant adverse to the plaintiffs. The word 'plaintiff' is defined in Section 2 of the Enactment to include "any person from or through whom a plaintiff derives his right to sue".

In their representative capacities the first and third plaintiffs could not have sued earlier than 1978 but the Probate Officer, in whom shares in the land were at various periods vested pursuant to Section 18 of the Probate and Administration Enactment 1955, could have done so. Therefore the period of limitation continued to run at least from September 1, 1967 when the Limitation Enactment came into force as against those 15/128 undivided shares as it did in relation to the balance of 35/128 undivided shares owned beneficially by the four plaintiffs.

Paragraphs 10 to 14 inclusive of the Statement of Claim positively alleged adverse possession by the defendant since 1964; a period of some 15 years prior to the date of Writ. Those allegations were admitted in Paragraph 1 of the Amended Defence. There was, therefore, no issue arising at trial between the parties on that score.

In so far as the plaintiffs sought, by way of Reply, to rely on other matters one only has to look at the first paragraph which, in conventional form, reads:

"The plaintiffs joined issue with the defendant on his defence except in so far as it consists of admissions of the Statement of Claim."

The alternative plea in Paragraph 2 that the defendant's occupation could not be adverse constituted a departure in pleading within the meaning of Order 20 Rule 15 of the Rules of the Brunei High Court and should have been struck out at an earlier stage. In any event there was no evidence before the learned Commissioner entitling him to find that the defendant had entered upon the land pursuant to the proviso in Section 13(1) of the Probate and Administration Enactment 1955. He certainly did not report his possession to the Probate Officer pursuant to sub-section 2 and a question may well arise as to whether or not the term 'asset' in that proviso includes real property.

The defendant said in evidence that he considered that the whole of the land belonged to his father and that, since his father's death, he had occupied and possessed that land on a like footing. This apparently suited him better than procuring the agreement of his two brothers to making a joint application for letters of administration in respect of a half share which would have yielded him a one-sixth share in the land following registration instead of a whole interest *de facto.*

The period between September 1, 1967, when the Limitation Enactment took effect, and the date of issue of Writ is less than 12 years and does

not satisfy Article 112 of the Limitation Enactment. It is therefore necessary for the court to consider the position under the Limitation of Suits Enactment repealed by Section 27 of the Limitation Enactment.

Section 3(g) of the repealed Enactment read:-

"Subject to the provisions contained in sections 4 to 9 inclusive, (irrelevant to the present issues), the High Court shall have discretion to dismiss any suit of any other description whatsoever unless instituted within the period of limitation provided therefor under the Limitation Ordinance of the Straits Settlements."

This sub-section necessarily applied to a suit for possession of land.

The material section of the Limitation Ordinance of the Straits Settlements was Section 3 which read:-

"Subject to sections 4 to 24, (which have no bearing on the matters in issue) every suit instituted after the period of limitation prescribed therefor by the Schedule shall be dismissed, provided that limitation has been set up as a defence."

Article 112 in the Schedule to the Limitation Ordinance of the Straits Settlements was in exactly the same terms as those of Article 112 of the Limitation Enactment 1962.

The question is therefore posed: "Did the right of the defendant to seek the exercise of the court's discretion in his favour so as to dismiss a claim by the plaintiffs for possession, having regard to his alleged and admitted adverse possession since 1964, survive the repeal of the Limitation of Suits Enactment?" It is here helpful to turn to the provisions of Section 13 which reads:-

"In computing the period of limitation in respect of any suit, the period commencing on December 22, 1941 and ending on December 30, 1949 shall be excluded."

That section, however, suggests overwhelmingly that the Limitation Enactment 1962 had retrospective effect. I so find. If I am wrong I hold that the defendant had an accrued and surviving right to seek the court's discretion under the Limitation of Suits Enactment; a right expressedly preserved by Section 10(c) and (e) of the Interpretations and General Clauses Enactment 1959. Those sub-sections respectively read:

"10. The repeal of any written law shall not –

(c) affect any right, power, obligation, restriction or liability acquired, accrued, imposed or incurred under any written law so repealed;

(e) affect any investigation, legal proceeding or remedy in respect of any such right, power, obligation, restriction, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such restriction, liability, penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been passed."

I am further persuaded in the views which I have expressed by a passage from the opinion of Lord Brightman in *Yew Bon Tew* v. *Kenderaan Bas Mara*[1] which reads:-

"An accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an Act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable."

By parity of reasoning such a right is not to be taken away by refusing a retrospective operation to the repealing statute unless such a construction is unavoidable.

I would, if it were necessary, exercise a discretion in the defendant's favour having regard to the facts and pleadings to which I have already alluded.

In the premises the plaintiffs' titles were extinguished pursuant to Section 26 of the Limitation Enactment and the defendant (the appellant) succeeds as against the plaintiffs (the respondents) both on the claim and the counterclaim. The appeal is therefore allowed. The relief under Paragraph 2 of the prayer of the counterclaim should, in my view, read: "a declaration and order under Sections 26 and 29 of the Land Code".

Having regard to the terms of Order 55, Rule 15 of the Brunei High Court Rules I would also discharge the extant order made some years ago pursuant to Order 15.

Briggs P. and **Leonard C.** concurred.

Appeal allowed.

Solicitors: *Choo Chan & Wong; David Clidero & Co.*